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The Morton Memo and Prosecutorial Discretion: An Overview

By Shoba Sivaprasad Wadhia

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued two significant memoranda on the use of prosecutorial discretion in immigration matters. Prosecutorial discretion refers to the agency's authority to not enforce immigration laws against certain individuals and groups. The primary memo (the Morton Memo on Prosecutorial Discretion) calls on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S. and instead spend the agency's limited resources on persons who pose a serious threat to public safety or national security. Morton's second memo focuses on exercising discretion in cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits. The memo instructs "[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."

A closer look at the Morton Memo on Prosecutorial Discretion reveals that it reaffirms many of the principles and policies of previous guidance on this subject. The memo, however, takes a further step in articulating the expectations for and responsibilities of ICE personnel when exercising their discretion.

Origins of Prosecutorial Discretion

The concept of prosecutorial discretion is not new to immigration law, and became public in 1975 after a lawsuit involving music legend, John Lennon. Lennon faced a medley of immigration issues. In order to help Lennon, his attorney Leon Wildes pushed the Immigration and Naturalization Service (INS) to disclose its policy on prosecutorial discretion under the Freedom of Information Act. This policy, known then as the "nonpriority" program, recognized that certain cases did not necessarily merit deportation; officers were instructed to consider advanced or tender age, long-time presence in the United States, health conditions, and family ties as reasons why the agency should consider exercising prosecutorial discretion favorably. While the agency's stated criteria for the "nonpriority" program were subsequently repealed, the substance of that guidance was preserved in a memorandum issued by former INS Commissioner Doris Meissner (Meissner Memo). The Meissner Memo contained a mandate for every officer to exercise prosecutorial discretion in a judicious manner at every stage of the enforcement process and also published a list of equitable factors INS officers should consider in making prosecutorial decisions.

After 9/11, Congress passed the Homeland Security Act of 2002, abolishing INS and creating the Department of Homeland Security (DHS). INS functions were absorbed and dispersed throughout the Department. While the creation of DHS changed the landscape and functions of immigration laws in significant ways, the agency has continued to support prosecutorial discretion guidance that favors smart enforcement and temporary relief for resident noncitizens with socially desirable qualities or compelling equities.

Two Premises for Prosecutorial Discretion

For more than 30 years, the use of prosecutorial discretion in U.S. immigration enforcement has been based on two premises. The first is the necessity of using limited resources wisely—in other words, it's about the money. To illustrate, a June 30, 2010, memorandum published by ICE

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concluded:

[ICE]…has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security.

Under that memo, ICE policy priorities are reflected in priority categories of individuals ICE seeks to target for arrest and removal. These categories are:

Priority 1. Aliens who pose a danger to national security or a risk to public safety
Priority 2. Recent Illegal Entrants
Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls.

Significantly, the recent Morton Memo on Prosecutorial Discretion reaffirms these priorities, but places them within the decision-making process by identifying them as adverse factors which can mitigate or cancel out other considerations in a given case.

The second theory of prosecutorial discretion concerns compassionate and humanitarian use of law-enforcement tools. Whereas resource issues motivate practical implementation decisions, humanitarian factors go to broader questions of whether justice is actually done in a given case. The kinds of factors that address this impulse in prosecutorial discretion include tender age, older age, the existence of a medical or mental health condition, the presence of family in the U.S., and positive contributions to the United States.

Exercising Prosecutorial Discretion

Various agency memoranda stipulate that prosecutorial discretion can be exercised by any branch of DHS in many forms and at many points in the enforcement process, a point reiterated by the Morton Memo on Prosecutorial Discretion. Moreover, these memos all consistently stress the wide range of circumstances where prosecutorial discretion should be exercised. To illustrate, an officer may decide not to bring charges against someone who is out of status and is otherwise in the U.S. working. After an arrest, an officer may decide not to detain a person who does not appear to be a danger or a flight risk. Even after an arrest or detention, a DHS employee or attorney may decide not to serve the individual and the court with a Notice to Appear (charging papers) in removal proceedings because the person appears to be eligible for a family benefit with the "services" side of immigration, United States Citizenship and Immigration Services. Moreover, if a person is already in removal proceedings, then ICE could exercise prosecutorial discretion by cancelling a Notice To Appear (NTA), or joining in a "motion to terminate." Finally, if a person has already been ordered removed, ICE could grant a stay of removal. Alternatively, anywhere in the process any DHS component could grant "deferred action," a discretionary remedy that keeps a person in a legal limbo. Regardless of the form prosecutorial discretion takes (i.e., NTA cancellation, deferred action, refraining from filing an NTA) the act itself confers no substantive benefit or right of action to the noncitizen.

Factors for Prosecutorial Discretion

While the standard for prosecutorial discretion in immigration matters has been largely the same for many years, the Morton Memo on Prosecutorial Discretion clarifies that standard in at least five important ways. First, it attempts to streamline the various memoranda on prosecutorial discretion by "build[ing] upon" a library of pre-existing policies on the subject. Second, it creates an extra "check" in the process by allowing ICE trial attorneys to review charging decisions by DHS employees and, as a matter of discretion, dismiss low-priority cases. Third, the Morton Memo on Prosecutorial Discretion directly addresses the role of the ICE attorney when an immigrant is in removal proceedings and the virtues of exercising discretion at this stage. Fourth, it clearly encourages ICE employees and attorneys to consider prosecutorial discretion "without waiting for an

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alien or alien's advocate or counsel to request a favorable exercise of discretion." In no other memoranda has there been such an explicit affirmative duty placed on the DHS employee to initiate prosecutorial discretion in cases. In fact, my experience in communicating with attorneys and researching this topic for several years is that only attorneys who are well informed about prosecutorial discretion and connected with DHS officials are successful. Finally, the Morton Memo on Prosecutorial Discretion offers a robust list of largely humanitarian circumstances that should trigger a favorable exercise of prosecutorial discretion. The list itself includes the following 19 factors that should be considered in deciding whether prosecutorial discretion is warranted:

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- Whether the person is likely to be granted legal status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state, or local law-enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

The Morton Memo on Prosecutorial Discretion also identifies classes of persons who warrant "particular care" when making prosecutorial decisions. Specifically, these individuals include:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

Prosecutorial Discretion Does Not Confer Legal Status

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Merely days after the Morton Memo was issued in June, select members of Congress, ICE's own union, private associations opposed to any immigration reform, and the press erroneously labeled Morton's memo on prosecutorial discretion a vehicle for circumventing Congress and, more specifically, as an "amnesty" for potential beneficiaries of the DREAM Act and other large groups. The problem with this label is that the DREAM Act is a piece of legislation that has been introduced in several Congresses in various forms; at its core, the DREAM Act provides graduated high-school students with a vehicle for earning permanent legal status in the U.S. if they go to college or serve in the military for a specified period of time. It should not be surprising that some potential beneficiaries of the DREAM Act have the kinds of equities that are given favorable consideration by agency officers exercising prosecutorial discretion. That said, it is inaccurate to label the new Morton Memo on Prosecutorial Discretion a backdoor route to passing the DREAM Act. First, any form of prosecutorial discretion is tenuous at best, and does not confer a legal status or benefit. In contrast, the DREAM Act would result in a legal status for eligible students. Second, prosecutorial discretion, however tenuous, should be considered in a variety of situations and applied to low-priority cases that include strong equities, not just to qualifying DREAM Act cases. Finally, decisions about prosecutorial discretion are normally made on a case-by-case basis as opposed to categorically.

Conclusion

Prosecutorial discretion has and will continue to play an important role in immigration enforcement. ICE has taken an important step by issuing the recent memos on prosecutorial discretion and protection for crime victims, guidance that is sensitive to individuals who have attributes that our society values, but who will remain vulnerable to harsh immigration enforcement unless ICE attorneys and employees do the right thing and are given the support to make those decisions. Implementation of the memos should include a process by which prosecutorial discretion is considered in every case brought to ICE's attention before a Notice to Appear is issued. ICE attorneys and employees must be trained on these memos, and held accountable when they are not followed. Moreover, ICE must keep statistics and profiles on the individuals considered for prosecutorial discretion and make them available to the public. Finally, ICE must invest resources in training and (re)acculturating its officers and attorneys to the concept of prosecutorial discretion and the importance of exercising it in each and every case.

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